

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "A", MUMBAI

BEFORE SHRI G.S.PANNU, ACCOUNTANT MEMBER
AND
SHRI RAMLAL NEGI, JUDICIAL MEMBER

ITA No. 7480/Mum/2014
(Assessment Year 2009-10)

M/s. Kaycee Shares Broking Pvt. Ltd.
Block H, Shri Sadashiv CHS Ltd.
6th Road, Santacruz (E),
Mumbai 400 055.
PAN:AACCK 7839A

..... Appellant

Vs.

The DCIT, Cen. Cir.46,
Aaykar Bhavan,M.K.Road,
Mumbai 400 020

.... Respondent

Appellant by : Shri Mukesh Choksi
Respondent by : Shri R.P.Meena

Date of hearing : 06/09/2016
Date of pronouncement : 09/09/2016

ORDER

PER G.S.PANNU,A.M:

The captioned appeal filed by the assessee pertaining to assessment year 2010-11 is directed against an order passed by CIT(A)-38 Mumbai dated 31/10/2014 which in turn arises out of an order passed by the Assessing Officer under section 271(1)(c) of the Income Tax Act, 1961 (in short 'the Act') dated 02/05/2013.

2. In this appeal, the only issue raised is with regard to the penalty imposed under section 271(1)(c) of the Act amounting to Rs.30,47,000/-

3. At the time of hearing the Ld. Representative for the assessee submitted that under identical circumstances penalty under section 271(1)(c) of the Act has been deleted by the Tribunal in the cases of M/s. Mihir Agencies Pvt. Ltd., in ITA No.695/Mum/2015 and Mr. Mukesh Choksi, in ITA No.996/Mum/2015 order dated 27/07/2016, who are entities of the same group

3.1 The relevant facts are that the assessment under section 143(3) r.w.s. 153C of the Act was completed in the case of the assessee for assessment year 2009-10 on 8/12/2011, wherein inter-alia, an addition was made to the returned income on account of commission earned from the activity of providing accommodation entries amounting to Rs.81,29,164/-. This addition was made by estimating the net commission income @2% on the total receipts as reflected in the bank accounts. Notably, while making such addition, the Assessing Officer brought out that search and seizure action under section 132(1) of the Act was carried out on 25/11/2009 in the cases of Mahasagar Securities Pvt. Ltd. (now known as M/s. Alag Securities Pvt. Ltd.), Mihir Agencies Pvt. Ltd., M/s. Alliance Intermediateries and Network Pvt. Ltd., and other companies belonging to the same group and Mr. Mukesh Choksi. The present assessee was also covered under such search and seizure action under section 132(1) of the Act. During the course of search a modus operandi was detected, whereby the entities managed and controlled by Mr. Mukesh Choksi were engaged in providing accommodation entries by way of share trading, capital gains, speculation profit entries, gifts, etc. Based on the findings in the course of search including the statement of Mr. Mukesh Choksi, the Assessing

Officer deduced that assessee had earned commission from the activity of providing accommodation entries, which was estimated @2%. The aforesaid estimation of commission income travelled to the Tribunal and vide our order of even date the same has been scaled down following the decisions of the Tribunal in the other concerns of the group.

4. In the above background, Ld. Representative for the assessee pointed out that similar situation has been dealt with by the Tribunal in the case of Mihir Agencies Pvt. Ltd., & Mr. Mukesh Choksi (supra), wherein the penalty levied under section 271(1)(c) of the Act has been deleted. Ld. Representative for the assessee pointed out that the Tribunal has duly noted that the difference between the assessee and the Revenue was primarily on the estimation of income earned from providing of accommodation entries and, therefore, the same would not be exigible for penalty under section 271(1)(c) of the Act. In this context, he has referred to the following discussion in the order of the Tribunal dated 27/07/2016 (supra):-

“ 6. We have heard the rival submissions and produce the material before us. We find that case under consideration an action u/s.132 of the Act was carried out covering all the group entities including the assessee under consideration, that it was found group concerns were engaged in providing accommodation bills/hawala entries, that the assessee did not dispute the said fact, that the AO estimated the income from the accommodation entries @ 2% of the total transactions appearing in the bank accounts of the assessee, that the then FAA confirmed the quantum addition made by the AO, that in the case under consideration the Tribunal had held that commission income should be taken at the rate of 0.15% (ITA /6435/Mum/2012 – AY-2004-05 and other six appeals dt.6.1.16). The undisputed fact is that there is difference of opinion as to how much income should be estimated for the hawala entries-the AO estimated at a particular percentage, whereas the assessee had shown the income at a different percent. The addition made by the AO and confirmed by the FAA in quantum

addition may or may not be. But, levying penalty on the basis of an estimated addition could not be held to be justified. No authority is required to be cited that penalty and assessment proceedings are separate and distinct proceedings and the quantum proceedings should not result in automatic levy of concealment penalty. It is a case of estimation of income by the AO and the assessee.

Here we would like to discuss two cases. One of them is Aero Traders P. LTD.(322 ITR 316).In that case the assessee-company had filed its return of income for the year 1997-98 on a notice u/s.148 of the Act, 1961declaring a loss of Rs. 83, 64, 468/-.The assessee had, in the return attached a note stating that it was impossible for it to substantiate its claim of loss by way of any evidence as the relevant records were seized and were with the police authorities. The AO after being unable to obtain copies of the seized documents, based his assessment order on the limited documents provided and rejected the book results declared by the assessee. He estimated the income of the assessee at Rs.61,00,000/-.He also initiated penalty proceedings separately. The FAA estimated the total income of the assessee at Rs.1,02,980/-.The Tribunal confirmed this order. The AO observed that the profit was estimated after rejection of books of account due to certain discrepancies and imposed a penalty on the assessee of Rs. 36,41,003/-, on the ground that it was a clear case of furnishing inaccurate particulars of income. The FAA deleted the penalty holding that the addition made by the AO on the basis of estimated profit could not be a subject-matter of penalty for concealment of income. The Tribunal confirmed this order. On appeal,the AO dismissed the appeal and held that the finding arrived at by the Tribunal did not warrant interference as it was purely a finding of fact. In the case of Durga Kamal Rice Mills(265 ITR 25)the Hon'ble Calcutta High Court has held as under:

“When two views are possible and when no clear and definite inference can be drawn, in a penalty proceeding, penalty cannot be imposed.....In quantum proceedings, a particular provision might be attracted for addition to the income of the assessee. But when it comes to the question of imposition of penalty, then independent of the finding arrived at in the quantum proceedings, the authority has to find conclusively that the assessee owns the concealed amount.”

Considering the fact that Tribunal has adopted a particular rate for estimating the income of the assessee for the year under consideration, we hold that the FAA was not justified in confirming the order passed by the AO u/s. 271(1)(c) of the Act. Therefore, reversing his order, we decide the effective ground of appeal in favour of the assessee.”

5. The Ld. Departmental Representative has not disputed the factual matrix brought out by the Ld. Representative for the assessee,

though he has defended the levy of penalty under section 271(1)(c) of the Act.

6. We have carefully considered the rival submissions. It is abundantly clear that modus operandi and the nature of income earned by the assessee, which has been subjected to the penal provisions of section 271(1)(c) of the Act in the instant case, are similar to those considered by the Co-ordinate Bench in the case of Mihir Agencies Pvt. Ltd., & Mr. Mukesh Choksi (supra). It is also abundantly clear that in the present case also the variation in the quantum of income assessable between assessee and the Revenue is on account of estimation only, an identical situation which has been considered in the aforesaid precedents. Therefore, following the aforesaid precedents, which have been rendered in similar circumstances, we hereby set-aside the order of the CIT(A) and direct the Assessing Officer to delete the penalty imposed under section 271(1)(c) of the Act. Thus on this aspect, assessee succeeds.

7. In the result, appeal of the assessee is allowed, as above.

Order pronounced in the open court on 09/09/2016

Sd/-
(RAMLAL NEGI)
JUDICIAL MEMBER

Sd/-
(G.S. PANNU)
ACCOCUNTANT MEMBER

Mumbai, Dated 09/09/2016
Vm, Sr. PS

Copy of the Order forwarded to :

1. The Appellant ,
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai